RE CHOONG HIN SEONG; EX P CIMB BANK BHD

HIGH COURT MALAYA, PULAU PINANG
AZIZAN MD ARSHAD JC
[BANKRUPTCY NO: PA-29NCC-97-03-2021]
31 MAY 2024

Abstract – *(i) A judgment debtor cannot challenge a bankruptcy notice which has been issued on a valid judgment, unless it can be proven by the judgment debtor that the principle of the case of Sovereign General Insurance Sdn Bhd v. Koh Tian Bee and Malayan Banking Bhd v. Datuk Lim Kheng Kim are applicable; (ii) Where there is a defect in terms of the actual amount when the creditor's petition is filed, the creditor's petition is flawed and can prejudice the judgment debtor.*

BANKRUPTCY: *Notice – Bankruptcy notice – Setting aside – Whether judgment debtor guarantor liable for judgment debt – Payment of dividends reducing total debt owing by judgment debtor to judgment creditor – Whether amounts stipulated in bankruptcy notice accurate – Whether there was oppression – Whether bankruptcy notice issued on valid judgment*

BANKRUPTCY: *Petition – Creditor's petition – Setting aside – Whether judgment debtor only guarantor liable for judgment debt – Payment of dividends reducing total debt owing by judgment debtor to judgment creditor – Whether amounts stipulated in creditor's petition accurate – Whether creditor's petition flawed – Whether judgment debtor prejudiced – Whether creditor's petition valid*

This was an appeal by the judgment debtor ('JD') against the decision of the Senior Assistant Registrar ('SAR') in dismissing the JD's application to set aside the bankruptcy notice ('BN') and the amended creditor's petition ('CP') and the order in which the SAR had allowed the judgment creditor ('JC') to commence bankruptcy proceedings against the JD. The JC filed the BN based on a judgment recorded at the Sessions Court ('Suit 203') for a sum of RM876,876.14. The suit was filed against the JD on the alleged grounds that the JD stood as a guarantor for the principal debtor pursuant to a guarantee and indemnity by individual or company ('guarantee agreement'). The two main issues that were argued before the SAR and before this court were: (i) JD was not the only guarantor to be liable for the judgment debt; and (ii) the Insolvency Department, subsequent to the filing of the BN and CP, paid out dividends which reduced the total debt owing by the JD to the JC, then amounts were not accurate as stipulated in the BN and the amended CP.

Held (ordering accordingly):

(1) The JD's allegations that if each of the JD settled the judgment sum, the JC would be getting more and this was an oppressive manner, was without merits. Furthermore, the JD had also failed to show that there was any counterclaim or cross-claim against the JC as per s. 3(1)(i) of the Insolvency Act 1967 ('Insolvency Act'). The total debt could be claimed. There was also no evidence that the JD had a counterclaim against JC, which allowed the BN to become irregular, which allowed it to be set aside by the court. The JD could no longer challenge the BN which had been issued based on a valid judgment. (paras 18-26)

(2) The payments of dividends have been made by the Insolvency Department. However, these payments of dividends had been made subsequent to the filing of the BN and the amended CP. The JD did not agree with the amount stated in the CP because there was a defect in terms of the actual amount when the CP was filed. The appeal against the BN was dismissed but was allowed an appeal against the CP. The CP was flawed and had prejudiced the JD. (paras 30 & 31)

(3) This court did not dismiss the CP but struck it out and gave an extension of time to the JC to re-file the CP, considering the period of six months from the order of this court. This court is yet to hear the CP on the merits. Even if an extension of time to file the CP is granted, under s. 5(7) of the Insolvency Act, if the said CP does not comply with the section, it could be annulled. (para 40)

(4) The JD's action in this case could not be considered as an abuse of the court process because this action to challenge the petition was allowed under the Insolvency Act. Even though the JD failed to comply with the judgment that had been legally obtained for which the CP was issued, but it still could be set aside. In conclusion, there were reasons to disturb the findings of the SAR. Thus, (i) the BN was valid and regular and the arguments on this issue were dismissed; (ii) the amended CP was invalid and set aside; (iii) the JC was granted leave to re-file the CP; and (iv) the extension date for re-filing the CP was extended until 24 June 2024. (paras 46, 47 & 51)

Case(s) referred to:

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(refd)***

Ber: Shahfie Ahmad v. Ex-parte: Azizi Yom Ahmad [2023] CLJU 1992; [2023] 1 LNS 1992 HC ***(refd)***

Ber: Siti Thasleem Osman Ghany; Ex p Fast Meridian Sdn Bhd [2023] CLJU 2774; [2023] 1 LNS 2774 HC ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Herukh Thakurdas Jethwani & Anor v. Bank Simpanan Nasional [2021] 2 CLJ 291 HC ***(refd)***
In Re Indran Kanavaji Kanawagi; Ex parte Public Islamic Bank Bhd [2022] CLJU 204 HC ***(refd)***
Ismail Daud & Hjh Qameriah Fateh Mohamed, Re: Ex p; Universal Life & General Insurance Sdn Bhd [1989] 2 CLJ 1043; [1989] 1 CLJ (Rep) 617 HC ***(refd)***
J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***
Kapten Ho Ooi v. Standard Chartered Bank Malaysia Bhd [2004] MLJU 733 ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong [2021] 5 CLJ 1 CA ***(refd)***
Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan [2021] 7 CLJ 823 FC ***(refd)***
Lim Pei Ying v. Lim Hui Ting [2021] MLJU 2528 ***(refd)***
Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors And Another Appeal [2022] 8 CLJ 697 CA ***(refd)***
Malayan Banking Bhd v. Datuk Lim Kheng Khim [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826 HC ***(refd)***
MBf Finance Bhd v. Alluwi Salleh t/a ABS Bina Enterprise & Anor [2002] 2 CLJ 133 HC ***(refd)***
Norzali Rosie v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2020] CLJU 314; [2020] 1 LNS 314 HC ***(refd)***
Per Dewana Tara Singh; Ex parte Standard Chartered Saadiq Bhd [2023] CLJU 2343; [2023] 1 LNS 2343 HC ***(refd)***
Pertiwi Prestij Sdn Bhd v. Damai Bistari Sdn Bhd [2019] CLJU 674; [2019] 1 LNS 674 CA ***(refd)***
Re Cheah Wee Liam, Ex P Robert Teng Lye Hock [1999] 4 CLJ 305 HC ***(refd)***
Re Low, Ex Parte Gibson [1985] 1 QB 734 ***(refd)***
Re Sulaiman Sahari; Ex p Hafitz Khalid & Anor [2019] CLJU 1138; [2019] 1 LNS 1138 HC ***(refd)***
Re Tunku Maryam Tunku Zainal Abidin; Ex parte Arab Malaysian Finance Bhd [2007] 8 CLJ 626 HC ***(refd)***
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***
Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal [2018] 2 CLJ 305 CA ***(refd)***
Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 HC ***(refd)***
Westech Sdn Bhd v. Thong Weng Lock [2017] 8 CLJ 257 FC ***(refd)***
Yap Heng Cheong v. Citibank Bhd [1999] 4 CLJ 365 HC ***(refd)***

Legislation referred to:
Insolvency Act 1967, ss. 2(ii), 3(1)(i), 5(1)(c), (7), 93(4)

For the judgment creditor - Surein Wei; M/s Zaid Ibrahim & Co
For the judgment debtor - Marcus Ow Wai Loon; M/s Arthur Wang, Lian & Assocs

Reported by Suhainah Wahiduddin

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JUDGMENT
(Encl. 811)

Azizan Mnd Arshad JC:

Introduction

B **[1]** This is an appeal ("this appeal") by the judgment debtor against the decision of the Senior Assistant Registrar ("SAR") on 3 November 2023 in dismissing the judgment debtor's application to set aside the bankruptcy notice (referred to as BN) dated 15 March 2023 and the amended creditor's petition (referred to as CP) dated 5 January 2023 and the order in which the C SAR had allowed the judgment creditor to commence bankruptcy proceedings against the JD.

[2] In this judgment, the parties are referred to as they were addressed before the learned SAR (judgment creditor's referred to as JC) and judgment debtor's as JD).

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Cause Papers

[3] The cause papers referred to during the hearing of encl. 87 are as follows:

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(i) request to issue bankruptcy notice dated 15 March 2021 (encl. 1);

(ii) bankruptcy notice dated 15 March 2021 ("BN") (encl. 2);

(iii) amended creditor's petition dated 5 January 2023 ("Amended CP") (encl. 49);

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(iv) summon in chambers dated 11 July 2023 to set aside the bankruptcy notice dated 15 March 2021 and amended creditor's petition dated 15 January 2023 (encl. 64);

(v) affidavit in support affirmed by Choong Hin Seong dated 21 July 2023 (encl. 69);

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(vi) affidavit in reply affirmed by Lim Chew Liang on 10 August 2023 (encl. 70);

(vii) affidavit in reply affirmed by Choong Hin Seong on 28 August 2023 (encl. 71);

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(viii) order dated 3 November 2023 by the SAR in respect of encl. 64 (encl. 88); and

(ix) notice of appeal dated 6 November 2023 against the SAR's decision in dismissing encl. 64 (encl. 81);

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Law On Appeal

[4] It is trite law that, when an appeal against the decision of the learned SAR is brought before the judge in chambers, the matter will be heard afresh, as though the matter comes before the judge for the first time. This principle has been established by the Federal Court in the case of *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241. The principle that has been decided in the abovementioned case has been followed by the High Court in the case of *Re Sulaiman Sahari; Ex-Parte: Hafitz Khalid & Anor* [2019] CLJU 1138; [2019] 1 LNS 1138, where the court held as follows:

> [10] Firstly, an appeal to the Judge in Chambers from a discretionary order of the SAR is treated as if the matter comes before the Judge for the first time. In *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716, the Supreme Court cited with approval the decision of Lord Atkin in *Evans v. Bartlam* [1937] AC 473 as follows:
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> > (1) In an appeal from a discretionary order of the master to a Judge in Chambers, the Judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the master's discretion; and
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> > (2) So far as the master's decision is concerned, the Judge will give it the weight it deserves.
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> > (see *Re Ahmed Ismail bin Hj Amin; ex parte Lembaga Kumpulan Wang Simpanan Pekerja* [2022] MLJU 129)

Issues

The two main issues that have been argued before the learned SAR and before this court are as follows:

(i) JD is not the only guarantor to be liable for the judgement debt; and

(ii) the Insolvency Department subsequent to the filing of the bankruptcy notice and creditor's petition, paid out dividends which reduced the total debt owing by the JD to the JC, then amounts are not accurate as stipulated in the BN and amended CP.

Undisputed Material Facts

[5] The following are the undisputed facts derived from the arguments and submissions of both parties:

[6] The JC filed this BN on 15 March 2023 based on a judgment dated 28 May 2019 recorded at the Kuala Lumpur Sessions Court Suit No. WA-B52NCC-203-04-2019 (Suit 203) for a sum of RM876,876.14.

[7] The defendants named in Suit 203 are as follows:

(i) YC Travel & Tours (Company No. 811016-V) (in liquidation) ("principal debtor");

A (ii) Chu Sau Ben (NRIC: 651001-01-5167);

(iii) Anuar bin Ahmad (NRIC: 640105-07-5443); and

(iv) JD.

B **[8]** This suit was filed against the JD on the alleged grounds that the JD stood as a guarantor for the principal debtor pursuant to a guarantee and indemnity by individual or company (guarantee agreement) dated 25 October 2016.

C **[9]** Before the action was taken against JD there were also some other actions that had been taken by JC before the principal debtor went into liquidation *vide* a proceeding at the Shah Alam High Court Winding Up Petition No. BA-28NCC-382-06-2019 on 25 September 2019 *vide* an email by the official receiver (OR) dated 2 April 2021, the OR confirmed having receipt of a sum of RM853,549.02 on 9 February 2021 being excess of the auction of principal debtor's assets.

D **[10]** By virtue of OR's letter dated 31 March 2023, the JC had received two payment of dividends deriving from the estate of the principal debtor an amount of (i) RM181,123.20 and (ii) RM187,969.43 whereby in total, RM369,092.63, being 19.81% of the approved amount of proof of debts filed against the principal debtor.

E **Judgment Debtor's Submissions**

[11] At the outset, the JD submitted on the following grounds before the SAR and this court. The grounds relied upon are as follows:

F (i) The JC had recovered two (2) partial payments of dividends from the OR in the form of dividends in respect of the Principal Debtor's estate;

(ii) For that reason, the amount stipulated in the Bankruptcy Notice dated 15.03.2021 and Amended Creditor's Petition dated 05.01.2023 ought to be reduced;

G (iii) *Vide* Clause 1.1 of the Guarantee Agreement, it is clearly stated that the amount claimable against the JD shall be the amount that which are owing and payable by the Borrower;

(iv) Pursuant to Suit 203, there are two guarantors, (1) Anuar bin Ahmad and (2) Chu Sau Ben; in respect of the Principal Debtor,

H (v) The JC had initiated a bankruptcy proceeding against Anuar bin Ahmad *vide* Penang High Court Bankruptcy No: PA-29NCC-98-03/2015 for the same amount as claimed against the JD;

(vi) However, the JC did not initiate any bankruptcy proceeding against Chu Sau Ben regardless of the latter's status as one of the guarantor for the Principal Debtor;

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(vii) In light of the above paragraph (a) - (f), the JD, at all material times, does not owe the amount stipulated in the BN and Amended CP; and

(viii) Hence, the Bankruptcy Notice and Amended Creditor's Petition must be set aside.

Judgment Creditor's Submissions

[12] The main arguments of JC are summarised as follows:

(i) the JD failed to cause an appearance and a judgment in default was entered against the JD on 28 May 2019;

(ii) the borrower was wound up by Standard Chartered Bank Malaysia Berhad in the Shah Alam High Court in Winding Up Petition No. BA-28NCC-382-06-2019;

(iii) the JC filed a proof of debt against the borrower and commenced this bankruptcy proceeding against the JD as the guarantor. This is in line with cl. 31 of the letter of offer which was accepted by parties;

(iv) despite being fully aware of the current status of the debt, the JD till to date failed, refused and/or neglected and/or elected not to make payments of the judgment debt to the JC;

(v) on 18 October 2022, the Insolvency Department had issued a letter stating that the dividend payable is approximately 17.42% of the debt lodged. As such, it was already clear at that point in time that the judgment debt will not be satisfied by the dividends;

(vi) on 8 February 2023, the Insolvency Department had paid out to the JC the dividends in the sum of RM181,123.20 and RM187,969.43;

(vii) as such, the liquidation of YC Travels and the payments of dividends thereof to its creditors is completed; and

(viii) it is submitted at the outset, that both the grounds relied on by the JD is wholly unmeritorious and clearly a *mala fide* attempt to stifle and delay the JC's rights under the judgment once again.

Findings Of The Court

JD Is Not The Only Guarantor To Be Liable For The Judgment Debt

[13] On the issues of the JC had recovered two partial payments of dividends from the OR in the form of dividends in respect of the principal debtor's estate, the JD was relying on cl. 1.1 of the guarantee agreement which clearly stated that the amount claimable against the JD shall be the amount that which are owing and payable by the borrower.

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1.1 The Guarantors hereby unconditionally and irrevocably guarantee as principal debtors, jointly and severally, and not merely as sureties, to pay and satisfy the Bank on demand:

(a) in full all monies which are owing and payable by the Borrower to the Bank under the Loan Agreement or such amount thereof as may be outstanding, whether certain or contingent now or hereafter owing as incurred to the Bank from or by the Borrower including all the interest, costs and charges described hereunder (hereinafter collectively referred to as "the Indebtedness");

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[14] Therefore, the amount stipulated in the bankruptcy notice dated 15 March 2021 and amended creditor's petition dated 5 January 2023 ought to be reduced. The JD was referring to the case of *Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal* [2018] 2 CLJ 305.

[15] On the other hand, the JC submitted that the guarantee and indemnity by individual or company dated 25 October 2016 expressly indicates that the guarantors guarantee as principal debtors, jointly and severally. Besides, the judgment in default dated 28 May 2019 explicitly states that the JD is jointly and severally liable for the judgment sum. Clause 31 states that:

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31) Bank's Right to Exercise Remedies Concurrently

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Notwithstanding any provision hereof, it is hereby expressly agreed that upon your default or breach, the Bank shall have the right to exercise the powers and remedies conferred by this Letter of Offer, the Security Documents and/or by law, statute or otherwise, and shall be entitled to exercise such powers and remedies concurrently:

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(i) to claim for the amount outstanding and the interest and other moneys due from you in the same or separate proceedings; and

(ii) to proceed simultaneously against you and any security providers satisfy the indebtedness to the Bank and to claim and execute judgment for moneys due to the Bank.

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[16] Therefore, the JD is one of the guarantors of the JC and had executed a guarantee and indemnity dated 25 October 2016 in favour of the JC. Clause 2(a) of the guarantee and indemnity further states that the JC is entitled to claim and enforce against the JD as though they were the principal debtors for all the sums guaranteed by the guarantors (JD). Clause 2(a) states that:

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2. Guarantors' Covenants

The Guarantors hereby further agree, undertake and covenant with the Bank as follows:

(a) Principal Liability

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That to give full effect to the provisions of this Guarantee and Indemnity the Guarantors hereby waive all rights inconsistent with the provisions of this Guarantee and Indemnity and which

> the Guarantors might otherwise as surety be entitled to claim and enforce, and the Guarantors declare that the Bank shall be at liberty to act as though the Guarantors were the principal debtors for all sums guaranteed by the Guarantors as aforesaid;

[17] In supporting this argument, learned counsel for the JC was relying on the case of *Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong* [2021] 5 CLJ 1; [2021] MLJU 142.

[18] After examining the argument, this court found that JD's allegations that if each of the JD settle the judgment sum, JC will be getting more and this is an oppressive manner is without merits. JD is relying on the case of *Sumathy* (*supra*) on this issue, but in fact, it has been commented by the Federal Court in the case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* [2021] 7 CLJ 823; [2021] 5 MLJ 253, where the Federal Court stated that:

> [27] Accordingly, so long as a judgment debt remains unrealised, the judgment creditor is entitled to proceed against one or any number of judgment debtors to secure the performance of an obligation in its entirety.
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> [28] The issue that possibly gives rise to confusion is s. 44(2) of the Contracts Act 1950 which allows the promisor who has paid the full promised amount to claim contribution from the joint promisor for an equal contribution. This means that the liability for the full promised sum is shared equally between all the promisors. However that is between the promisors, *inter se*. It does not affect the rights of the creditor which are governed by s. 44(1) of the Contracts Act 1950.
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> [29] This brings us to the underlying rationale for joint liability as opposed to joint and several liability. Each of these doctrines relates to the number of promises made, and not the number of promisors who made a particular promise. In the case of joint liability, there is one promise and two or more promisors. Each is liable to the extent of the promised amount. In the case of a joint and several liability, there is more than one promise. The promisors make two or more promises and thus several liability arises.
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> [39] In our considered opinion, the courts below erred in law in invoking the presumption that joint liability means liability for only half the debt and not the full amount. As mentioned earlier, joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promises. The promisee, *ie*, the Board, is therefore entitled to proceed against one promisor, or the other, or both, in order to procure full performance as is evident from s. 44 of the Act.

[19] The Federal Court further stated in paragraphs:

A [31] As stated earlier, the courts below regarded themselves bound by the earlier Court of Appeal decision in *Sumathy*. In *Sumathy*, the creditor sued the principal borrower and the guarantor for monies outstanding under a friendly loan. Summary judgment was entered against both defendants, on the same terms, but the judgment did not state whether the liability of the parties was joint or several. Subsequently, two separate bankruptcy B notices were filed at the same time against the principal borrower and the guarantor, both specifying the judgment debt of RM291,800.

[32] The Court of Appeal held at para. 19 of the judgment that a plaintiff who becomes a judgment creditor where the liability is joint, is only entitled to seek recovery in equal proportions against each of the C defendants. This premise is, with respect, flawed because it pre-supposes that liability is proportionate to the number of promisors, from the perspective of the creditor. In *Sumathy*, the position of the creditor was conflated with the position of the debtors or promisors *inter se*, as we have explained above.

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[40] Furthermore, there is a notable absence of terms creating 'joint' liability in the judgment itself. Even if such a term had been inserted that would not entitle the courts to conclude that liability is somehow halved between the two obligors or promisors. Given the prevailing interpretation of s. 44 of the Act, merely inserting the word 'jointly' in the consent E judgment would not suffice to halve liability as there must be express words to that effect to state that the liability of the joint promisors is to be borne in equal proportions. Moreover, such halved liability should take root from the original promise whereby the liability of a promisor for a debt owed to a creditor is expressly stated to be only half of the debt. If we are to accept the premise that 'joint and several liability' cannot be read F into the judgment due to an absence of such words, it similarly follows that a silent judgment cannot automatically be inferred to impose 'joint' liability where there is no such mention. This is especially so when the liability that arises is explicitly stipulated by statute. In the circumstances, liability under the consent judgment must necessarily be both joint and G several in light of our discussion above.

[41] One final point remains to be made. The Court of Appeal in *Sumathy* was concerned that the judgment creditor would be "very much overpaid" if both defendants were to be liable for the amounts in the bankruptcy notices. To address this, guidance can be gleaned from *Tang Min Sit v. Capacious Investments Ltd* [1996] AC 514, where Lord Nicholls of H Birkenhead delivering the Privy Council judgment at p. 522 said that:

> ... a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also I liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he

> might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

(see *Re Ahmed Ismail bin Hj Amin; ex parte Lembaga Kumpulan Wang Simpanan Pekerja* [2022] MLJU 1291).

[20] In the case of *Herukh Thakurdas Jethwani & Anor v. Bank Simpanan Nasional* [2021] 2 CLJ 291; [2021] 8 MLJ 407, held that;

> ... I hold that notwithstanding that the judgment is silent as to whether the obligations for the judgment sum are joint and several or joint only, the defendant's rights against the plaintiff in this case is on a joint and several basis as provided for in the annexure aforesaid and this continues to survive the judgment.

[21] In *Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong* [2021] 5 CLJ 1; [2021] 2 MLJ 234, the Court of Appeal held that:

> In both *Sumathy*'s case and *Edwin Cassian*'s case, the Court of Appeal had concluded that a judgment entered against two or more judgment debtors, without more, created a joint liability such that each of the joint debtors was only liable for an *aliquot* portion of the judgment sum and therefore enforcement may only be limited to that *aliquot* portion. However, in the present appeal, the court had arrived at different conclusion from that in *Sumathy*'s case and *Edwin Cassian*'s case. *Upon the authorities discussed in the present appeal and the consistency of judicial views expressed, the court was inclined to conclude that a judgment entered for payment of a sum of money against several judgment debtors imposed upon them and each of them, a joint and several liability to honour the entire judgment debt, and not merely an equal portion of it, unless otherwise stated* (see paras 56 & 58).
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> (emphasis added)

(see *Ber: Siti Thasleem Osman Ghany; Ex p Fast Meridian Sdn Bhd* [2023] CLJU 2774; [2023] 1 LNS 2774; [2023] MLJU 3121).

[22] This argument on this issue is without merit, therefore this court cannot agree with the submission by learned counsel for the JD. Furthermore, JD has also failed to show that there is any counterclaim or cross-claim against JC as per s. 3(1)(i) of the Insolvency Act 1967 and therefore, all the allegations raised by JD in the application for objection to BN. Then the total debt can be claimed as in the case of *Re Low, Ex Parte Gibson* [1985] 1 QB 734, it was decided that:

> ... where judgment has been recovered against several persons jointly, a bankruptcy notice may be issued against one of the joint judgment debtors without including the others

The Insolvency Department Subsequent To The Filing Of The Bankruptcy Notice And Creditor's Petition, Paid Out Dividends Which Reduced The Total Debt Owing By The JD To The JC, Then Amounts Are Not Accurate As Stipulated In The BN And Amended CP

[23] In this case, there is also no evidence that JD also had a counterclaim against JC which allows the BN to become irregular which allows it to be set aside by the court. This is clear as outlined in the case of *Kapten Ho Ooi v. Standard Chartered Bank Malaysia Bhd* [2004] MLJU 733, which decided as follows:

> ... They must as decided in *Datuk Lim Khenq Khim v. Malayan Banking Bhd* [1993] 2 MLJ 298, follow the requirement under r. 18 of the Bankruptcy Rules where unless the Judgment Debtor has a counter claim, set off and cross demand which equals or exceeds the judgment debt, challenges to any creditor's petition or Bankruptcy Notice must be made by filing a notice of motion (summons in chambers now after the amendment on r. 18 of the Bankruptcy Rules), supported by an affidavit ...

[24] In *Re Cheah Wee Liam, Ex P Robert Teng Lye Hock* [1999] 4 CLJ 305; [1999] 6 MLJ 615, held:

> There are only two ways to challenge the bankruptcy notice, *ie,* under r. 95 of the Rules on the ground of the existence of counterclaim, *etc* and under r. 18 on other grounds. This application is made under r. 95 by way of an affidavit filed within seven days after the service of the bankruptcy notice. The affidavit does not say anything about the existence of a counterclaim, set-off or cross demand. The affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Bankruptcy Act 1967, and the case should have been treated as if no affidavit under r. 95 had in fact been filed. Similarly, the affidavit does not attract the provisions of proviso 2(ii) of s. 3 of the Bankruptcy Act 1967 because it does not condescend to particulars of the amount actually due.

[25] In *Ber: Shahfie Ahmad v. Ex-parte: Azizi Yom Ahmad* [2023] CLJU 1992; [2023] 1 LNS 1992; [2022] MLJU 03725, held:

> (54) Dalam kes *Per: Selvaraja Namachivayam; ex parte Narayanasamy a/l Krishnan* [2022] MLJU 2141, memutuskan bahawa:
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> [22] Mahkamah Agung dalam kes *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 MLJ 304; [1988] 1 CLJ (Rep) 277, memutuskan bahawa BN yang menuntut jumlah yang lebih besar tidak akan mencacatkannya dan boleh dipinda seperti diputuskan oleh Lee Hun Hoe CJ (Borneo) bahawa:
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> > Williams and Muir Hunter on *The Law and Practice of Bankruptcy* (19th Ed) at p. 492 under the heading 'Formal Defect Not To Invalidate Proceedings', refers to s. 147(i) of the English Bankruptcy Act 1914 which is word for word the same as our

> s. 131: 147(1). No proceeding in bankruptcy shall be invalidated by any formal defect or by Irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.

[23] Mahkamah Agung juga dalam kes *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 1 MLRA 288; [1993] 2 MLJ 298; [1993] 3 CLJ 324 tidak menerima alasan bahawa jumlah yang tidak tepat akan menjadikan BN tidak sah. Mahkamah memutuskan seperti berikut:

> Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent "based on an erroneous calculation and grossly exaggerated" without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s. 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

[26] At this stage, JD can no longer challenge the judgment and also BN and CP which have been issued based on a valid judgment, unless it can be proven by the JD that the principle in the case of *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277; [1988] 1 MLJ 304 and the case of *Malayan Banking Bhd v. Datuk Lim Kheng Khim* (*supra*) are applicable.

[27] In the case of *Malayan Banking v. Datuk Lim Kheng Khim* (*supra*), Abdul Hamid JC decided that:

> I shall now try to summarize the law from the authorities. It seems to me that:
>
> (a) a bankruptcy court has power to go behind a judgment on which the bankruptcy proceedings are founded if there is evidence of fraud, collusion or miscarriage of justice;
>
> (b) an irregularity or formal defect is no sufficient reason for going behind the judgment;
>
> (c) a bankruptcy court may go behind a judgment if it is founded on a contract which is void because it is contrary to an express statutory provision;
>
> (d) a bankruptcy court may go behind a judgment and inquire into the validity of the judgment even if an application to set aside the judgment had been made, dismissed, and affirmed by a court superior to the bankruptcy court.

[28] Referring to s. 3(1)(i) of the Insolvency Act 1967 which provides:

A debtor commits an act of bankruptcy if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order given leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained ...

[29] But it should be remembered once again, in this case, only the claimed amount is alleged to be inaccurate. But this court agrees with JC's argument that it is protected by s. 2 of the Act (including proviso (ii) of the Act) which provides that:

... bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served personally to a debtor:

Provided that a bankruptcy notice

(i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

[30] The JC submits that the JC does not dispute on the payments of dividends have been made by the Insolvency Department. However, these payments of dividends had been made subsequent to the filing of the bankruptcy notice and the amended creditor's petition. The JD did not agree with the amount stated in the CP because there was a defect in terms of the actual amount when the CP was filed.

[31] This court dismissed the appeal against BN but allowed an appeal against the CP. This court found that the CP was flawed and prejudiced JD. In the case of *Ismail Daud & Hjh Qameriah Fateh Mohamed, Re: Ex p; Universal Life & General Insurance Sdn Bhd* [1989] 2 CLJ 1043; [1989] 1 CLJ (Rep) 617, it was held that:

> I agree with Counsel that if the amount specified in the notice is quantified or is quantifiable then even if the amount *demanded exceeds the amount actually due such a notice will not per se* invalidated unless the debtor within the prescribed 7 days gives notice to the creditor that he disputes the validity of the notice on the ground of the mistake. In the absence of a dispute by the debtor of the quantum it is not for the Court or the Official Assignee to question the quantum of the amount claimed in the notice. However, if what is claimed is not clear as opposed to being excessive it is, in my view, the duty of the Court and of the Official Assignee to take note of such lack of clarity and inspect it in the light of s. 131 of the Bankruptcy Act which is as follows:
>
> > S. 131. No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court. (emphasis added)

This court will not discuss further as to why this court has struck out the CP with the liberty to re-file as there was no appeal against it by the JC.

[32] But in this case, when the court struck out the CP, the filing of a new CP will go beyond the provisions of s. 5(1) of the Insolvency Act 1967:

> Section 5. Conditions on which creditor may petition
>
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (a) the debt owed by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owed to the several petitioning creditors, amounts to one hundred thousand ringgit;
>
> (b) the debt is a liquidated sum payable either immediately or at some certain future time;
>
> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition;

[33] Based on the provisions of s. 5(1)(c) of the Insolvency Act it is mandatory for the CP to be filed within six months from the act of bankruptcy begins. This court refers to the case of *Westech Sdn Bhd v. Thong Weng Lock* [2017] 8 CLJ 257; [2017] 5 MLJ 368, held that:

A [2] Under s. 3(1)(i) of the Bankruptcy Act 1967 ('the BA'), an act of bankruptcy is committed upon the expiry of seven days from the date of service of the BN. In this case, on the premise that no legal impediment exists, the act of bankruptcy begins from 1 November 2011. Any creditor's petition ('CP') to be filed, must be done within six months of the latter date (s. 5(1)(c) of the BA).

B **[34]** This court takes note and fully complies with the decision of the higher court. However, in this case the court found that no provision under s. 93(4) of the Insolvency Act 1967 was referred to in *Westech Sdn Bhd*'s case (*supra*). There is also no decision related to this section that was decided by the Federal Court in relation to the court's power to extend the CP under
C s. 93(4) of the Insolvency Act 1967, states as follows:

Section 93. Discretionary powers of the court

(1) Subject to this Act and to general rules, the costs of and incidental to any proceeding in court shall be in the discretion of the court.

D (2) ...

(3) ...

(4) Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as to the court
E seems fit.

[35] In *In Re Indran Kanavaji Kanawagi; ex parte Public Islamic Bank Bhd* [2022] CLJU 204; [2022] 1 LNS 204; [2022] MLJU 167, held:

[10] The Insolvency Act provides that the Court has a discretion to extend
F time where time has been provided for doing an act, as the Court deems fit pursuant to Section 93(4) of the said Act which reads:

(4) Where by this act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as to the
G court seems fit.

[11] The above is further supplemented by Rule 275 of the Bankruptcy Rules 1967 which provides:

The Court may under special circumstances and for good cause shown extend or abridge the time appointed by these rules or fixed
H by any order of the Court for doing any act or taking any proceedings.

[13] In coming to this Court's decision, I have accepted the cases submitted by the JD being *Mui Bank Bhd v. Raju* [1990] CLJU 132; [1990] 1 LNS 132 and *Rohani @ Hamidah bt Nor v. Sincere Leasing Sdn Bhd* [1993]
I 1 AMR 225 where Siti Norma Yaakob J (as Her Ladyship then was) in the former case held that the Court is unconstrained to extend time and

in the latter case where Mahadev Shankar J (as he then was) held that the Court may where special circumstances and for good cause shown extend or abridge time appointed by the rules.

[36] This court is guided by the case of *Mahisha Sulaiha Abdul Majeed v. Ketua Pengarah Pendaftaran & Ors And Another Appeal* [2022] 8 CLJ 697; [2022] 5 MLJ 194, which ruled as follows:

> [144] Therefore, the Federal Court in *CCH* did not decide on the same provisions of the FC as in *CTEB*'s case. I am of the considered opinion that the cases of *CTEB* and *CCH* are not in conflict on the same point of law, as the decision of CCH is on s. 1(a) of Part II read together with s. 19B of Part III. As such, the latter case of *CCH* did not overrule *CTEB* on the interpretation of art. 14(1)(b) read with s. 1(b) of Part II, Second Schedule of the FC.

[37] Based on the *Mahisha Sulaiha*'s case, the court opined that even if there is a higher court decision it will not automatically overrule the previous case unless it is related to the same legal issue. If there is such a situation then this court can refer to it even if it does not follow it. It is not the intention of this court not to comply with '*stare decisis*' or binding precedent because if it is related to the same legal issue or provision decided by the Federal Court, this court must comply with it even if it does not agree with the decision. In the absence of a higher court case that specifically refers to the provision, this court refers to and follows the case of *Yap Heng Cheong v. Citibank Bhd* [1999] 4 CLJ 365; [1999] 6 MLJ 607, which is still relevant because it has never been overruled by the superior court of this country.

[38] In *Yap Heng Cheong*, Abdul Hamid Embong J, decided that:

> The power to extend time derived under this primary legislation, it seems to me, is unconstrained, not even when the time is limited by any rules. As such, if there arises any conflict in the exercise of this discretion under s. 93(4) of the Act, with any of its rules, this power will, in my view, and following the decision in *Wee Chow Yong t/a Vienna Music Center v. Public Finance Bhd* [1990] 1 CLJ 176; [1989] 3 MLJ 509, override anytime constraint under the rules.

[39] In our case, CP must be filed within six months from the date of the act of bankruptcy begins. During the pendency of the hearing of this appeal, the proceedings for the adjudication order (AO) and receiving order (RO) have been adjourned pending this appeal. During that time, the CP had already been filed within six months. When this court struck out the CP, of course the six months expired. Therefore, if the extension is not given to JC to file CP, it will severely prejudice the JC's right. This court is of the opinion that the situation would be different if CP was not filed by JC at all during that six months.

[40] In our case, this court did not dismiss the CP but struck it out and gave an extension of time to the JC to re-file the CP before 24 June 2023, considering the period of six months from the order of this court. This court is yet to hear the CP on the merits. Even an extension of time to file the CP is granted, under s. 5(7) of the Insolvency Act 1967, clearly indicating that if the said CP does not comply with the section, it can be annulled. Excerpts from the section are as follows:

> 5. Conditions on which creditor may petition:
>
> ...
>
> (7) If the petitioning creditor fails to comply with the requirements of this section, the court shall dismiss the petition.

[41] In the case of *Ber: Shahfie Ahmad v. Ex-parte: Azizi Yom Ahmad* [2023] CLJU 1992; [2023] 1 LNS 1992; [2022] MLJU 03725, held:

> [38] Mahkamah Persekutuan dalam kes *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2004] 1 CLJ 239; [2004] 1 MLJ 257, Mahkamah memutuskan bahwa:
>
> > It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.
>
> [39] Fakta kes mestilah menunjukkan bahawa ianya adalah di luar keadaan biasa dan bukan sekadar alasan yang kebiasannya dinyatakan oleh pihak-pihak. Prinsip ini dinyatakan oleh Abdul Hamid Mohamad JCA dalam kes *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 iaitu:
>
> > although what may amount to special circumstances is a question of fact in each case, the circumstances must be special, and neither ordinary, nor common.

[42] Analogously, if the decision had exceeded the period of six months and the court allowed the appeal, and set aside the CP, the JC could not re-file the CP due to limitation. If this happens, then there will be injustice to JC because the six months period is beyond JC's control. In our case, where this court struck out the CP and if no extension of time is given, JC's rights will be severely affected. This court agrees that if there was a deliberate act by the JC in filing the CP, then it was not a valid reason for the extension of time. For this reason, the court found that there is an element of special circumstances for the extension of time.

[43] In relation to the wording in a provision, this court focuses on the guidelines and principles in the case of *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122, where it was decided:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. *On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded ...* (emphasis added)

(refer to *Per Dewana Tara Singh; ex parte Standard Chartered Saadiq Bhd* [2023] CLJU 2343; [2023] 1 LNS 2343; [2023] MLJU 2828).

[44] In *MBf Finance Bhd v. Alluwi Salleh t/a ABS Bina Enterprise & Anor* [2002] 2 CLJ 133; [2002] 1 MLJ 497 it was *inter alia* held:

> The grant of extension of time was discretionary to be exercised by the judge in each particular case, but the factors to be considered were; (a) the length of the delay; **(b) the reasons for the delay;** (c) the chances of the appeal succeeding; and **(d) the degree of prejudice to the would be respondent if the application was granted.** (see p 503B-C)
> (emphasis added)

(refer to *Pertiwi Prestij Sdn Bhd v. Damai Bistari Sdn Bhd* [2019] CLJU 674; [2019] 1 LNS 674; [2019] MLJU 435).

[45] Other issues *ie*, "abuse of court process", that have been raised by parties, have also been considered. Whether JD's action is an abuse of court process should be seen from the facts of the case. This guidance has been given in the case of *Re Tunku Maryam Tunku Zainal Abidin; Ex-Parte: Arab Malaysian Finance Bhd* [2007] 8 CLJ 626, where it was decided that:

> *Regrettably, even in Bankruptcy cases, I have observed the not uncommon ploy of JDs to grossly delay court proceedings, by making all sorts of applications for striking out etc, at the BN stage, as well later, at the CP stage of the proceedings and then to appeal to the judge in chambers, the Court of Appeal and even to the Federal Courts coupled with an application for stay of the Petition.* In the result, it sometimes takes a JC eight to fifteen years to recover the judgment debt or to secure a truly final adjudication and receiving order. *Just take this case as an example. The JC first obtained judgment on 1st June 1995 before the SAR, which was confirmed by the judge in chambers and the Court of Appeal – without further appeal by the JD. Until now, about 11 years later, the JC has vet to recover the fruits of litigation and the JD is still trying to 'go behind the judgment'. When it dawned on her counsel that she was about to fail on this score her counsel adopted the 'other sufficient cause' argument to support her contention that "the existence of a valid judgment does not ipso facto warrant an Adjudication and Receiving Order."* And, now that she has appealed against my decision confirming the AORO, a few years may yet have to be added to the eleven years delay that the JC has had to endure to recover the judgment debt.
> (emphasis added)

[46] But this court is of the opinion that the JD's action in this case cannot be considered as an abuse of the court process because this action to challenge the petition is allowed under the Insolvency Act 1967.

[47] In a nutshell, even though the JD failed to comply with the judgment that has been legally obtained for which the CP was issued but it still could be set aside. This principle has been stated in the case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104, held that:

> [1] When determining an issue under the Bankruptcy Act 1967, it is incumbent upon the court to accord its provisions a strict construction. The consequence of such an approach is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment is null and void *ab initio*.

Other relevant issues are also considered, but in general, not in favour of the JD.

Postscript

[48] When this judgment was prepared, the appeal filed by the JD was out of time. It has to be said that "a right of appeal" is the creation of statute. In *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485, the Federal Court held that:

> It is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, **so unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.** (emphasis added)

[49] In *Lim Pei Ying v. Lim Hui Ting* [2021] MLJU 2528, it was held:

> Rules 12 Time limit for appeal
>
> **No appeal shall, except by leave of the Court, be brought after the expiration of thirty days:**
>
> (a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing:
>
> (b) in the case of an appeal against the refusal of an application, from the date of such refusal;
>
> (c) **in all other cases, from the date on which the judgment or order appealed against was pronounced.**
>
> (refer to Rules of the Court of Appeal 1994). (emphasis added)

[50] In *Norzali Rosie v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2020] CLJU 314; [2020] 1 LNS 314, held that:

[25] If a party is out of time to file an Appeal (CA), the party can apply for leave of the Court of Appeal under r. 12 RCA (except by leave of the Court) to file the Appeal (CA). According to r. 2 RCA, the term "Court" in r. 12 RCA only refers to the "Court of Appeal and includes a Judge of that Court". *It is therefore clear that the High Court cannot extend time for a party to lodge an Appeal (CA)*

[26] Enc. 6 was dismissed by this court on 27.11.2019 (Decision (Encl. 6)). According to r. 12(b) RCA, the Applicant should have filed his notice of appeal to the Court of Appeal against the Decision (Enc. 6) (Applicant's Appeal) on or before 27.12.2019 (within one month from the date of the Decision (Enc. 6)). The Applicant's Appeal was however only filed on 22.1.2020. There was therefore a delay of 26 days (from 27.12.2019 until 22.1.2020) in the filing of the Applicant's Appeal. More importantly, the Applicant has not obtained leave of the Court of Appeal under r. 12 RCA to file the Applicant's Appeal beyond the stipulated one-month period. (emphasis added)

Conclusion

[51] In conclusion, based on the above reasons, there may be reasons for this court to disturb the findings by the learned SAR. The court's decision is as follows:

(i) the bankruptcy notice dated 15 March 2021 is valid and regular and the arguments on this issue are dismissed;

(ii) the amended judgment creditor's petition (CP) dated 5 January 2023 is invalid and set aside. An appeal on this issue is allowed;

(iii) the JC is granted leave to re-file the creditor's petition;

(iv) the extension date for re-filing the CP is extended until 24 June 2024; and

(v) no orders as to costs.